No. 81356-6

In the

Supreme Court of the State of Washington

BIANCA FAUST, individually and as guardian of GARY C. FAUST, a minor, and BIANCA CELESTINE MELE, BRYAN MELE, BEVERLY MELE and ALBERT MELE,

Petitioners,

v.

MARK ALBERTSON, as Personal Administrator for the ESTATE OF HAWKEYE KINKAID, deceased, MOOSE INTERNATIONAL, INC. and JOHN DOES (1-10),

Defendants,

and BELLINGHAM LODGE #493, LOYAL ORDER OF MOOSE, INC., and ALEXIS CHAPMAN,

Respondents.

ANSWER OF RESPONDENTS BELLINGHAM LODGE #493, LOYAL ORDER OF MOOSE, INC. AND ALEXIS CHAPMAN TO BRIEFS OF *AMICI CURIAE* MOTHERS AGAINST DRUNK DRIVING AND WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

RUSSELL C. LOVE (WSBA #8941)
THORSRUD CANE & PAULICH
1300 Puget Sound Plaza
1325 Fourth Avenue
Seattle, Washington 98101
(206) 386-7755

PAUL V. ESPOSITO (*pro hac vice*)
CLAUSEN MILLER P.C.
10 South LaSalle Street
Chicago, Illinois 60603
(312) 855-1010

Attorneys for Respondents

COUNSEL PRESS · (866) 703-9373

PRINTED ON RECYCLED PAPER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Statute and Rules:

RESTATEMENT OF THE CASE

It is undisputed that Kinkaid entered the lodge about 4:30 p.m. and that Chapman served him a beer soon thereafter (RP430-31, 435). Kinkaid had not been drinking earlier (RP427-32, 1737-38). Chapman later served Kinkaid a second beer (RP443). The Fausts offered no evidence as to the elapsed time between the service of those beers. They also offered no evidence of the elapsed time between Chapman's service of the second beer and Kinkaid's departure.

The observational evidence regarding Kinkaid's condition at the lodge is also undisputed. Six witnesses testified that Kinkaid appeared normal and exhibited no signs of intoxication at any time. [Leibrant (RP537-41, 559-60); Frank Rose (RP631-32, 648-50); Eleanor Rose (RP1274-75); Larry Rayborn (RP1297-99); Ray Anderson (RP1320-21); Alexis Chapman (RP395-97, 1727-28)].

Plaintiff Bianca Mele testified that the accident occurred immediately after she saw 7:28 on her car clock (RP90-91). No plaintiff disputed her testimony. Mele testified without contradiction that for 5-10 minutes no one approached the Faust car (RP93-94). An emergency call reached area police at 7:46 p.m. (RP1392-93).

The accident occurred in Ferndale, about seven miles and 14-17 minutes north of defendant's lodge in Bellingham (RP918-19). Kinkaid

was not driving away from the lodge at the time of the accident. He was driving back toward it (RP1375-76). A State trooper found a 40-ounce partially empty bottle of hard liquor near Kinkaid's seat (Ex. 71; RP1377-79).

There was no observational evidence of Kinkaid's condition once he left the lodge. The Fausts' medical-examiner witness testified that Kinkaid was "essentially dead at the scene" (RP187).

ARGUMENT

I. *Barrett v. Lucky Seven Saloon* Does Not Raise A Question As To The Type Of Evidence Needed To Prove Overservice.

The *amici* have created needless controversy over *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn. 2d 259, 96 P.3d 386 (2004). In *Barrett*, the issue concerned the degree of intoxication needed to prove overservice. This Court adopted the statutory "apparently under the influence" standard. *Id.* at 273-74, citing RCW 66.44.200(1). The court of appeals applied that standard (A.6 n.3).

But *Barrett* did not abandon or call into question the long line of cases requiring observational evidence to prove overservice. This Court stated that *Barrett* "upset[s] no established precedent" and "adds no new, additional burden" on liquor sellers. *Id.* at 274. Indeed, the statutory standard adopted in *Barrett* is an observational standard. RCW

66.44.200(1). It requires a drinker to actually appear intoxicated. That requires observation, not blood chemistry.

Any argument that *Barrett* opens the door to using BAC evidence to prove overservice was laid to rest by the dissent. Justice Madsen addressed the *Barrett* plaintiffs' argument that the "apparently under the influence" standard supports the use of BAC evidence:

> This court has made it abundantly clear, however, that a person's level of intoxication is not to be measured by a blood alcohol test but is instead to be measured by the person's appearance at the time alcohol is provided to the person. *Christen v. Lee*, 113 Wash.2d 479, 487-89, 780 P.2d 1307 (1989); *Purchase v. Meyer*, 108 Wash.2d 220, 223-28, 737 P.2d 661 (1987). In *Christen*, the court summarized its analysis in *Purchase*:
>
> > First, we noted that a furnisher of intoxicating liquor ordinarily has no way of knowing how much a person has consumed before entering the establishment. Next, we observe that a person who is a heavy drinker may be legally intoxicated and still not *appear* intoxicated. Finally, we explain that there are medically recognized variables in the way that alcohol may react on the human body.
>
> *Christen*, 113 Wash.2d at 489, 780 P.2d 1307 (emphasis added) (footnotes omitted). The court also said "[e]vidence of the amount of alcohol consumed is not sufficient by itself to establish that a person was furnishing intoxicating liquor while obviously intoxicated." *Id.* at 487, 780 P.2d 1307. It follows that civil liability cannot depend upon whether a commercial establishment provides enough alcohol to a person for his or her BAC to reach or exceed the legal limit. Not only do *Christen* and *Purchase* foreclose such an argument, it is unfair and unreasonable to place any such burden on commercial vendors of alcohol,

> who simply cannot be expected to judge an individual's BAC. Thus, insofar as *Barrett* seems to suggest that the "apparently under the influence" standard must be given to permit this kind of argument, it is unavailing.

Id. at 278 279. Consistent with its statement that it had left established law unchanged, the majority did not dispute Justice Madsen's analysis.

Moreover, *Barrett* did not create a question regarding the "quantum" of evidence needed to establish overservice (WSAJ 7, 20). The testimony of only one observational witness, even a liquor server, is enough to raise a jury question. In *Young v. Caravan Corp.*, 99 Wn. 2d 655, 658-59, 663 P.2d 834 (1983), this Court relied on an affidavit of a cocktail waitress (the drinker's girlfriend) to reverse summary judgment for defendant. So WSAJ's discussion about BAC-corroborated admissions by commercial sellers is irrelevant (WSAJ 15-16). And so is its discussion about adjusting the "quantum" standard (WSAJ 19-20).

Even after *Barrett*, a plaintiff needs observational evidence that a drinker appeared under the influence of alcohol at time of service. As the court of appeals correctly found, this was the very evidence that the Fausts lacked (A.9-13).

II. This Case Does Not Fit Under The *Dickinson* Exception.

WSAJ tries to fit this case within the very limited exception of *Dickinson v. Edwards*, 105 Wn. 2d 457, 716 P.2d 814 (1986) (plurality

op.) (WSAJ 12-15). This Court has noted that *Dickinson* is "factually unique." *Purchase v. Meyer*, 108 Wn. 2d 220, 227, 737 P.2d 661 (1987); *Christen v. Lee,* 113 Wn. 2d 479, 491, 780 P.2d 1307 (1989); *Burkhart v. Harrod*, 110 Wn. 2d 381, 392, 755 P.2d 759 (1988) (Utter and Brachtenbach J.J., *concurring*). It is far different from this case.

The *Dickinson* facts are critical. Plaintiff was injured only five minutes after driver Edwards left a company banquet. Edwards admitted that while there, he was served 15-20 drinks in 3-1/2 hours. Five minutes after the accident, police observed that Edwards was unstable on his feet, had blood-shot eyes, smelled of alcohol, and failed physical testing. 105 Wn. 2d at 816. These facts raised a question as to the use of an observation "made within a very short time *after* service of alcohol or an admission by the drinker of gross over consumption of alcohol." *Id.* at 463. Although unwilling to define the time period, the plurality stated that post-service observations must be "in close proximity" to the time of service. *Id.* at 463-64.

That is the problem with the Faust's evidence. They did not establish the time between Chapman's serving the second beer and her alleged observations of Kinkaid. The parties agree that decedent Kinkaid entered the lodge at about 4:30 p.m. and had not been drinking earlier that day (RP427-32, 1737-38). Chapman testified that she served Kinkaid his

first beer around 4:30 p.m. (RP430-31, 435). The Fausts offered no contrary observational testimony. Significantly, they offered no observational evidence as to when Kinkaid was served his second beer. It could have been well before Kinkaid displayed the effects, if any, from his first beer. A jury could only speculate, but speculation is prohibited. *Adams v. King County*, 164 Wn. 2d 640, 647, 192 P.3d 891 (2008); *Little v. King*, 160 Wn. 2d 696, 705, 161 P.3d 345, 350 (2007).

According to Rainy Kinkaid and Lisa Johnston, Chapman stated that decedent Kinkaid was drunk when he left the lodge. Even if true, that testimony did not satisfy *Dickinson*. Again, the problem is time. The Fausts offered no evidence as to the elapsed time between Kinkaid's receiving his second beer and his leaving the lodge. Was it 20 minutes, 60 minutes, or even longer? The record is silent. The Fausts have told this Court that Kinkaid left the lodge at 7:30 p.m. (Pl. Supp. Br. 5). Their toxicologist essentially assumed the same thing. (RP234-36). The Kinkaid/Johnston testimony was specifically linked to the time that Kinkaid left the lodge (RP265-68, 336; A.10-11). So the jury could only guess whether Chapman's observations were closely proximate, if proximate at all, to service. Guessing is not allowed. *Adams*, 164 Wn. 2d at 647; *Little*, 160 Wn. 2d at 705.

This case is unlike *Dickinson* in other respects. *Dickinson* requires that a trial court "must consider whether the drinker had consumed any alcohol after and independent of the defendants' furnishing or whether any time remained unaccounted for between the last furnishing by the defendants and the subsequent observations." 105 Wn. 2d at 464. In either case, the subsequent observation will not raise an issue as to overservice. *Id.* In *Dickinson*, Edwards' accident occurred five minutes after he left the banquet hall; decedent was observed five minutes later. *Id.* at 460. Here, the accident occurred in Ferndale, about 14-17 minutes and seven miles north of Bellingham (RP918-19, 1237, 1375). It occurred while Kinkaid was driving back toward the lodge, not away from it (RP1375). And it occurred while Kinkaid had a partially empty 40-ounce bottle of hard liquor in his van (Ex. 71; RP1377-78). Furthermore, Edwards admitted to drinking 15-20 drinks in a 3-1/2 hours at the banquet. 105 Wn. at 465. Here, decedent Kinkaid did not testify to his consumption, and observational witnesses only saw him drink two beers.

Fairbanks v. J.B. McLoughlin Co., 131 Wn. 2d 96, 929 P.2d 433 (1997), is also distinguishable. An accident occurred about 20 minutes after Neely left a company banquet honoring her as employee of the year. About ten minutes later a police officer saw Neely stumble out of her car and stagger as she walked. Her breath smelled of alcohol. Her speech

was slurred. When asked whether she was drinking, Neely stated that she had two glasses of wine. She later claimed that she drank two glasses of champagne. Neely gave contradictory accounts of when she left the banquet. Following the filing of suit against her employer, she claimed for the first time that she drank 2-3 cognacs at a lounge after leaving the banquet. However, the lounge owner submitted an affidavit stating that the lounge was closed when Neely was supposedly served. *Id.* at 98-99, 102. Based on Neely's own time estimate, the officer's observations were sufficiently close to raise a fact question as to overservice. *Id.* at 103. But here, plaintiffs offered no evidence as to the time between the service of Kincaid's second beer and Chapman's alleged observations of intoxication. The *Fairbanks* facts are not even remotely close to those here.

The court of appeals correctly recognized that *Dickinson* and *Fairbanks* have a short reach (A.7-8). They do not reach this case.

III. BAC Evidence Should Not Be Available To Corroborate Observational Evidence.

The *amici* want this Court to rule that BAC evidence may corroborate observational evidence of overservice (WSAJ 16-18; MADD 7). This Court should reject their argument.

The issue is not presented by this appeal. The Faust's petition for review does not include it as an assignment of error. Generally, issues raised only by an *amicus* will not be considered on appeal. *Noble Manor Co. v. Pierce County*, 133 Wn. 2d 269, 272 n.1, 943 P.2d 1378 (1997). Contrary to WSAJ's argument, defendants have not suggested that it is an issue on remand (WSAJ 17 n.1).

The only case supporting the *amici's* position is distinguishable. In *Cox v. The Keg Restaurant U.S., Inc.*, 86 Wn. App. 239, 249-50, 935 P.2d 1377 (1997), eight witnesses offered first-hand observational testimony that a patron was visibly intoxicated when served. Here, six witnesses offered first-hand observational testimony that Kinkaid did not appear intoxicated. No witness offered contrary observational testimony. Rainy Kinkaid and Lisa Johnston were not in the lodge with decedent Kinkaid.

The *amici* claim that RCW 46.61.506 supports the use of BAC evidence to corroborate overservice. However, the statute does not concern overservice. It is part of the motor vehicle code and pertains to driving while under the influence. It regulated Kinkaid, not defendants. BAC evidence was available to prove that Kinkaid was intoxicated. It was unavailable to show that defendants overserved him. *Dickinson*, 105 Wn. 2d at 463.

There is no observational evidence of overservice in this case. Under the guise of corroboration, the *amici* want BAC evidence to substitute for missing observational evidence. The law does not allow it.

But even if this Court reaches the *amici's* issue, it should hold that BAC evidence is inadmissible for corroborative purposes. The Court has already noted several problems in using BAC evidence to prove overservice. *Purchase v. Meyer*, 108 Wn. 2d 220, 225-227 n 11 & 12, 773 P.2d 661, 664-65 (1987); *Christen v. Lee*, 113 Wn. 2d 479, 489, 780 P.2d 1307, 1311 (1989); *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn. 2d 259, 278-79, 96 P.3d 386, 404-05 (2004) (Madsen, J., *dissenting*). Evidence interpreting BAC results deals with average hypothetical drinkers, not with the drinker at issue. Because BAC evidence is not probative of actual overservice, the evidence is also not corroborative of it. As for WSAJ's suggestion that BAC will help establish why a drinker likely tripped, that information is unimportant (WSAJ 18). If a drinker shows any signs of intoxication that cannot be shown to be totally unrelated to alcohol, he may not be served regardless of the reasons for them. And as for arguing "the relationship between BAC and obvious intoxication," that argument was foreclosed by *Purchase* and *Christen* (WSAJ 18). There is no relationship, which is why this Court has repeatedly held BAC evidence inadmissible to prove overservice.

Another problem in using BAC evidence for corroboration is that like all science-based evidence, it tends to be overpowering. Jurors may disregard flimsy observational evidence of overservice and impose liability based solely on BAC-related evidence. Contrary to law, the so-called corroborative evidence will often be dispositive. The error will evade appellate review because verdicts may not be impeached over credibility determinations. *Breckenridge v. Valley General Hospital*, 150 Wn. 2d 197, 204-05, 75 P.3d 944 (2003) (individual or collective thought processes unavailable to impeach verdict).

The *amici's* proposal is particularly dangerous when the BAC evidence is as inexact as it is here. Kinkaid lost a significant amount of blood at the scene and received large amount of fluids (A.3). There was no measurement of the blood loss or fluid intake. So the toxicologist's estimate was just that — an estimate. Moreover, his testimony assumed that Kinkaid drank at the lodge until 7:30 p.m. even though Mele pinpointed the accident at 7:28 p.m. (RP90-91, 234-36). And it happened about seven miles from Bellingham (RP918-19). Inaccurate BAC evidence will skew rather than support a jury's credibility determination.

The *amici* only want BAC evidence to be used to corroborate admissions of overservice (WSAJ 17; MADD 7). But a corroboration rule should not be limited to benefit only one party. Assume that witnesses see

signs of intoxication in an inexperienced drinker. The bartender continues to serve but denies overservice. If a corroboration rule is available to a plaintiff, the bartender should be allowed to use a low BAC reading to corroborate his own testimony and defeat a plaintiff's claim. BAC evidence may create problems with effective liquor control.

IV. This Court Should Not Adopt A Strict Liability Standard Governing Overservice.

MADD wants this Court to allow BAC-related evidence as sufficient proof of overservice (MADD 9-13). In MADD's view, defendants were liable here because Kinkaid was intoxicated and had been drinking at the lodge. MADD essentially urges this Court to impose strict liability on liquor sellers. The Court should refuse.

The history of liquor regulation in this state is well known. The Legislature enacted a dramshop law in 1905 but repealed it in 1955. *Estate of Kelly v. Falin*, 127 Wn. 2d 31, 36, 896 P.2d 1245 (1995). The repealed law imposed liability if it could be believed that a sale of liquor would lead to intoxication. *Id.* The Supreme Court responded to the repeal by imposing liability on liquor servers when observational evidence of overservice exists. *Id.* at 36-37. This remains the rule. The Legislature has not reenacted a dramshop law notwithstanding its enactment of many other laws related to alcohol.

The Court has rejected attempts to judicially impose a dramshop law. In *Shelby v. Keck*, 85 Wn. 2d 911, 541 P.2d 365 (1975), plaintiff's decedent was accidentally shot in defendant's bar. The shooter had a 0.16 BAC reading. Plaintiff argued that the evidence was sufficient to impose liability. This Court disagreed:

> In effect, the plaintiff seeks to have this court adopt a theory of strict liability to be applied against one who furnishes liquor whenever a patron commits a tort while intoxicated. The rule proposed by the plaintiff amounts to a common law 'Dramshop Act' (a misnomer since remedies provided under these types of statutes were unknown at common law), to replace the statutory provisions repealed by our Legislature. Laws of 1955, ch. 372, s 1, repealing RCW 4.24.100. We find this theory of recovery totally unacceptable. *Id.* at 915-16.

More recently, in *Estate of Kelly* the Court reaffirmed its refusal to judicially impose a strict liability scheme. 127 Wn. 2d at 37-38. It stated:

> We repeatedly have recognized that the "Legislature is the appropriate body to address any such changes in [this area of] the law." *Christen*, 113 Wash.2d at 494, 780 P.2d 1307 (citing *Burkhart v. Harrod*, 110 Wash.2d 381, 383, 755 P.2d 759 (1988). We refuse to contravene the Legislature's explicit rejection of the "Dramshop Act". To do so would usurp the Legislature's authority to weigh who should be held accountable for alcohol-related accidents. *Id.* at 38.

The Legislature is presumably aware of Supreme Court case law. *Gimlett v. Gimlett*, 95 Wn. 2d 699, 702, 629 P.2d 450 (1981). The Legislature's decision to not reenact a dramshop law suggests that is satisfied with this Court's overservice rule.

The facts here expose the flaw of a strict liability scheme. After Kinkaid left the lodge, he traveled at least seven miles north to Ferndale (RP918-19, 1237, 1375). At an unknown location, he turned around his van and headed south to the spot of the accident. He had a partially-empty 40 ounce bottle of liquor in the van (Ex. 71; RP1377-78). If Kinkaid had the liquor when he left the lodge, Kinkaid could have started drinking (and for free) as soon as he reached his van. If Kinkaid obtained the liquor afterward, Kinkaid undoubtedly was drinking elsewhere. But MADD's strict liability scheme does not take this evidence into account. Nor does MADD's scheme consider the evidence, albeit disputed, that Kinkaid was seen drinking liquor in a Ferndale bowling alley before the accident (A.4). Instead, MADD would hold defendants liable for overservice simply because BAC testing showed Kinkaid to be intoxicated after the accident. MADD's inflexible approach is unfair.

MADD argues that its scheme is necessary because observational proof of overservice sometimes will be unavailable (MADD 10 n. 5). But proving a driver's intoxication at the time of an accident does not prove how he became intoxicated. Even the *Dickinson* plurality recognized that BAC evidence only proves intoxication, not overservice. 105 Wn. 2d at 463. It is a plaintiff's burden to prove overservice. His inability to do so

is no reason to fundamentally change the law. After all, the lack of evidence haunts many parties — and not just in overservice cases.

MADD argues that its proposed rule will prevent interested defense witnesses from affecting results (MADD 10 n.5). But in *Young v. Caravan Corp.*, the Court allowed a plaintiff to prove liability based solely on the observational testimony of decedent drinker's girlfriend. 99 Wn. 2d at 658-59. Besides, disregarding a witness' testimony because of bias generally does not prove the opposite. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512, 104 S.Ct. 1949 (1984); *Beck Development Co. v. Southern Pacific Transportation Co.*, 44 Cal. App. 4th 1160, 1205, 52 Cal. Rptr. 2d 518 (1996). A witness' relationship to a party neither proves nor disproves a claim of overservice. Only observational testimony does. *Wilson v. Steinbach*, 98 Wn. 2d 434, 436, 656 P.2d 1030, 1031 (1982) (affirming summary judgment based on affidavits of three defendants).

MADD is understandably concerned with the problem of drinking and driving. But the Legislature and this Court are no less concerned, and their statutory and common law solutions have been effective. MADD's proposed scheme of basing a server's liability on hypothetical drinkers rather than on observational evidence of overservice is neither wise nor fair. But in the final analysis, that is a legislative call. MADD's proposal

belongs in the Legislature, not in this Court. *Estate of Kelly*, 896 P.2d at 38.

CONCLUSION

For the foregoing reasons, respondents ask this Court to affirm the decision of the court of appeals. Alternatively, respondents ask this Court to order the court of appeals to consider those issues previously raised by the Lodge and Chapman but not addressed in the court of appeals' opinion.

Respectfully submitted,

RUSSELL C. LOVE

Russell C. Love (WSBA #8941)
THORSRUD CANE & PAULICH
1300 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101
(206) 386-7755

PAUL V. ESPOSITO

Paul V. Esposito (*pro hac vice*)
CLAUSEN MILLER P.C.
10 South LaSalle Street
Chicago, IL 60603
(312) 855-1010

Attorneys For Respondents

DECLARATION OF SERVICE

On said day below I deposited in the United States mail one true and accurate copy of the following document: Answer Of Respondents Bellingham Lodge #493, Loyal Order Of Moose, Inc., And Alexis Chapman To Briefs Of *Amici Curiae* Mothers Against Drunk Driving And Washington State Association For Justice Foundation, to each of the following:

Deborra E. Garrett
Zender Thurston, P.S.
1700 D Street
Bellingham, WA 98227-5226

George M. Ahrend
P.O. Box 2149
Moses Lake, WA 98837

Leslie Moore
511 East John Carpenter Freeway
Suite 700
Irving, TX 75062

Philip A. Talmadge
Talmadge Law Group P.L.L.C.
18010 Southcenter Parkway
Tukwila, WA 98188-4630

James C. DeZao
DeZao & DeBrigida, LLC
322 Route 46 West, Suite 120
Parsippany, NJ 07054

Steve Chance
119 North Commercial Street
Suite 275
Bellingham, WA 98225

Bryan T. Harnetiaux
517 East Seventeenth Avenue
Spokane, WA 99203

William Edward Fitzharris, Jr.
Preg O'Donnell & Gillett PLLC
1800 9th Avenue, Suite 1500
Seattle, WA 98101-1340

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 1st day of May, 2009 at Chicago, IL